

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
DOROTHY HURD and CITIZENS
AGAINST RODEO SPRAYING,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, and
AQUATIC CONTROL,

Respondents.

PCHB No. 85-58

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal from Department of Ecology Order No. DE 85-257, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk (presiding), Gayle Rothrock, and Wick Dufford, at a formal hearing in Lacey, Washington, on July 8 and 9, 1985.

Appellants appeared by attorney Ronald Steingold; respondent Department of Ecology appeared by Charles W. Lean, Assistant Attorney General; and Aquatic Control was represented by its owner, James

1 Carsner. Reporters Marie Dillon and Jean M. Ericksen recorded the
2 proceedings.

3 Witnesses were sworn and testified. Exhibits were examined. From
4 testimony heard and exhibits examined, the Board makes these

5 FINDINGS OF FACT

6 I

7 Appellant Dorothy Hurd is a citizen and a member of the Citizens
8 Against Rodeo Spraying. Citizens Against Rodeo Spraying is a
9 coalition of property owners.

10 II

11 Respondent Department of Ecology (DOE) is a State agency charged
12 with the administration and enforcement of chapter 90.48 RCW.
13 Respondent Aquatic Control Ltd. is a company involved in the
14 management of aquatic vegetation in lakes, including the application
15 of herbicides.

16 III

17 This appeal is brought by the appellants to stop the proposed
18 spraying of the herbicide Rodeo on up to 25 acres of water lily and
19 water shield on Lake Kathleen.

20 IV

21 Lake Kathleen is a relatively small, shallow lake located east of
22 Renton in King County. The upland area surrounding the lake is
23 predominantly developed with single-family residences. The lake is
24 going through a natural eutrophication process, slowly filling with
25 sediments and becoming shallower and warmer. These natural processes

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1 lead to favorable growing conditions for floating-leaved aquatic
2 plants such as water lilies. Approximately 70 percent of the lake and
3 associated wetlands are covered by aquatic plants, mostly water lilies
4 and water shield.

5 V

6 On January 9, 1985, James Carsner, owner of respondent Aquatic
7 Control applied to the Department of Ecology for an order allowing a
8 temporary modification of water quality to be caused by the spraying
9 of an herbicide (Rodeo) to control the spread of water lilies and or
10 water shield.

11 VI

12 On April 5, 1985, DOE issued Order No. DE 85-257. This Order
13 provided that:

14 On January 9, 1985, Aquatic Control submitted a
15 request for temporary modification of the water
16 quality standards of Lake Kathleen, King County,
17 during the period July 16 to October 31, 1985 for the
18 purpose of applying Rodeo. (EPA-approved labeling
19 instructions will be followed when applying
20 herbicides.)

21 The Department of Ecology used the following
22 information to evaluate this proposal: Environmental
23 Checklist, Aquatic Plant Management Assessment form,
24 and a site inspection. After review, it was
25 determined that the impacts of the proposed action
26 were not substantially different than the impacts
27 discussed in the Final EIS Aquatic Plant Management
through Herbicide Use (May 1980); the department,
therefore, adopted the existing Final EIS.

23 In view of the foregoing and in accordance with
24 RCW 90.48.120(2):

25 IT IS ORDERED that the water quality standard
26 specified in WAC 173-201-045(5)(c)(vii) is hereby
27 modified for a limited period as provided in WAC

1 173-201-035(8)(c)(i) beginning July 16, 1985 and
2 terminating at midnight, October 31, 1985.

3 The following conditions will be complied with
4 during the initial application of herbicides and
5 during any reapplication of herbicides within the
6 time limits imposed by this Order, as applicable:

- 7 1. EPA labeling instructions shall be followed.
- 8 2. The applicator shall have an Aquatic Commercial
9 pesticide License issued by the Department of
10 Agriculture.
- 11 3. Notify the appropriate Washington State
12 Department of Game and Fisheries Regional Offices
13 and Department of Ecology Regional Office 24
14 hours prior to application of aquatic herbicides
15 into any surface waters of the state.
- 16 4. All treatment areas shall be posted stating the
17 presence of herbicides and indicating any water
18 use restrictions. If there are no water use
19 restrictions, indicate that also.
- 20 5. Where the majority of the lake is to be treated,
21 inform all residents around the lake of the
22 proposed treatment including product, approximate
23 time to be treated and any use restrictions.
24 When smaller areas are to be treated, inform
25 residents of all shoreline property within 400
26 feet of the area to be treated by personal
27 notification mail or hand bills. Notification
will be given one week prior to treatments. For
copper compounds notification will be given prior
to treatment.
6. Public access, resort and public boat launch
areas will be posted with a sign constructed of
plywood (not less than three feet square)
explaining water use restrictions.
7. When herbicide labeling restricts human
consumption of fish, any posted signs or other
forms of notification shall state the
restriction. Do not state or imply the lake is
closed to fishing. This is under the authority
of the Department of Game.
8. Normally, treated areas will comprise a very

1 small percentage of the lake at any one time.
2 Treated areas will be marked from both the
3 shoreline and water, so that fishermen and others
4 are aware of the restrictions. Marker buoys
5 shall identify the treated areas. All buoys or
6 other markers shall state any use restrictions and
7 shall also state that such restrictions apply
8 within the buoyed area and 400 feet surrounding
9 that buoyed area.

9. 10. Ensure that the posting and notification process
includes all persons who may reasonably withdraw
water in the treatment or drift area.
10. 11. Since most lakes receive heavy recreational use
during weekends and holidays, treatments will be
done if possible on Mondays and Tuesdays, thereby
minimizing water use restrictions during weekends
or holidays.
11. 12. Spraying of herbicides shall not be conducted so
as to create public water use restrictions
Memorial Day weekend, July 4 weekend, Labor Day
weekend, or the opening of any applicable fishing
season.
12. 13. Twenty to twenty-five percent of water lilies or
similar aquatic vegetation shall be retained.
This is very important habitat for fish rearing
and spiny-ray fishing.
13. 14. The Department of Ecology, the Department of
Game, and Department of Fisheries shall be
notified immediately in case of a fish kill.
14. 15. Aquatic Control will assure that the application
of herbicides to the target area will not affect
crops or deny the downstream use of water for
irrigation.
15. 16. Do not apply Rodeo within .5 miles upstream of a
potable water intake.
16. 17. Notify the Department of Game District Fish
Biologist, Bob Pfeiffer, (206) 774-8812, one (1)
week prior to chemical treatment.

18 The Department retains continuing jurisdiction to
19 make modifications hereto through supplemental order,
20 if it appears necessary to further protect the public
21 interest during the modification period.

VII

Feeling aggrieved by this Order appellant appealed to this Board on April 15, 1985.

VIII

On May 3, 1985, the Department of Ecology received the final determination of non-significance completed by King County on May 8, 1984, for the surface application or spraying of the aquatic herbicide Rodeo to 25 acres of water lilies and water shield on Lake Kathleen.

IX

On May 21, 1985, the Department of Ecology issued the first amendment to Order No. DE 85-257. It provided that:

The second paragraph Order No. 85-257, issued April 5, 1985, is hereby amended as follows:

The Department of Ecology used the following information to evaluate this proposal: Environmental Checklist, Aquatic Plant Management Assessment form, and a site inspection. The department also relied upon the Final Determination of Non-Significance dated May 8, 1984 issued by King County Department of Planning and Community Development.

All other provisions and conditions of Order No. 85-257 remain unchanged.

The department retains continuing jurisdiction to make modifications hereto through supplemental order, if it appears necessary to further protect the public interest during the modification period.

X

Rodeo is an aquatic herbicide manufactured by the Monsanto Company especially for the control of emerged aquatic grasses, broadleaf weeds and brush. It is represented by the company that Rodeo, when used as

1 directed, has the following properties and characteristics:
2 essentially non-toxic to mammals, birds and fish; completely
3 biodegradable to natural products; does not bioaccumulate in the food
4 chain; highly effective, broad-spectrum weed control; no residual soil
5 activity; no leaching into non-target areas; non-volatile.

6 Testimony from experts in toxicology and botany essentially
7 confirmed the company's claims.

8 XI

9 Respondent Aquatic Control proposes to apply Rodeo as a surface
10 spray at two separate times during each treatment year. These times
11 would occur during the flowering to post flowering stages of the
12 plant, normally late July to early September. The application would
13 be performed with the use of an airboat and special applicating
14 equipment. Mr. Carsner testified that in addition to the actual
15 treatment, monitoring would be performed to check for any effects on
16 water chemistry.

17 The drift of the spray onto properties whose owners do not desire
18 the herbicide would be prevented by use of a polymer which increases
19 the droplet size. This technique permits the applicator to limit the
20 application to the spread of the spray from the spraying gun.

21 XII

22 Residents testified on behalf of respondents that as the water
23 lilies continue to expand, they seriously interfere with the residents
24 ability to use and enjoy the lake for recreational activities such as
25 boating, fishing and swimming. Residents who have lived on the lake

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1 for up to twelve years noted that recreational access to the lake has
2 been getting progressively more restricted over time. They argue that
3 the lilies are effectively blocking access to open water for boats and
4 swimmers and present a danger to swimmers by entanglement in the
5 roots. This testimony was not contradicted. The lake is being
6 rendered unusable for the activities which give waterfront ownership
7 its special value. Even the appearance of the lake is growing less
8 attractive.

9 XIII

10 Over a number of years, the lakefront owners, through their
11 community club and independently, have tried to combat the water lily
12 problem through manual and mechanical means. These approaches have
13 proven ineffective. The problem has worsened.

14 Numerous alternatives to the use of an herbicide have been
15 explored. No superior method to get control of the problem has been
16 found. The problem is too extensive for hand-pulling techniques.
17 Lake rehabilitation through dredging or drawdown is out of the
18 question financially for the property owners to undertake. The
19 general use of bottom screening material is also far too costly
20 considering the extent of the problem.

21 Considerable testimony was offered concerning the merits and
22 demerits of using a so-called Chub mechanical harvester. The Board
23 was not convinced that this approach would be physically practical and
24 we find that it would, in all probability, be considerably more
25 expensive than herbicide application.

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XIV

Appellants testified they are very concerned with the environmental effects of using Rodeo. They offered considerable testimony showing the existence of nesting eagles in the environs of Lake Kathleen. However, their testimony made no connection between the existence of eagles in the area and any possible harm to these birds from the use of Rodeo. Similarly, no threat of harm to humans, other animals or plants (other than water lilies) was shown by the appellants.

XV

Because Rodeo's active ingredient--glysophate--degrades very rapidly, its application to Lake Kathleen would alter water quality so briefly that any effects other than to targeted plants would be ephemeral and probably undetectable. None of the characteristic uses of the water would be interfered with. Indeed, such uses would ultimately be enhanced by the application.

Toxic properties have been identified with a surfactant used in Round Up, another glysophate-based herbicide. This surfactant, however, is not present in Rodeo.

XVI

We find that Rodeo does not represent a public health or an environmental hazard when used according to label directions.

A more than moderate effect on the quality of the environment was not shown to be a reasonable probability from the activity approved in this case.

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XVII

Dorothy Hurd testified that she attempted unsuccessfully to become involved in DOE's decision-making process before the temporary modification of water quality standards was approved. There is no process for public involvement in such agency decisions before they are made.

XVIII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Order at issue was issued pursuant to the authority of RCW 90.48.120(2), a section of the state water pollution control law authorizing administrative orders. The substance of the order was to modify the following water quality standard for Lake Class waters:

Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use. WAC 173-201-045(c)(vii).

The modification is limited to the period July 16 through October 31, 1985.

II

RCW 90.54.020(3)(b) sets forth a general policy for nondegradation of the quality of the state's waters. In pertinent part, it states:

...Notwithstanding that standards of quality

1 established for the waters of the state would not be
2 violated, wastes and other materials and substances
3 shall not be allowed to enter such waters which will
4 reduce the existing quality thereof, except in those
5 situations where it is clear that overriding
6 considerations of the public interest will be served.

7 Appellants assert that this high standard of need --"overriding
8 considerations of the public interest"-- must be met before an aquatic
9 herbicide can be applied to Lake Kathleen.

10 We disagree. We do not think that the Legislature intended to
11 limit the use of herbicides around water to cases involving some sort
12 of public crisis. We think the purpose of RCW 90.54.020(3)(b) was to
13 prevent water quality degradation of a more lasting and pervasive
14 nature than the controlled use of herbicides normally entails.

15 There may be cases where the duration or breadth of effects of
16 herbicide usage would call RCW 90.54.020(3)(b) into play, but this is
17 not one of them. Here the effects on non-target species and on the
18 water itself will be so limited and so short-lived as to make it
19 inappropriate, as a matter of law, to hold that the substance entering
20 the water "will reduce the existing quality thereof" within the
21 meaning of the statute.

22 III

23 We conclude that this case is governed by WAC 173-201-035(8)(e).
24 That subsection reads:

25 (e) The criteria and special conditions established
26 in WAC 173-201-045 through 173-201-085 may be
27 modified for a specific water body on a short-term
28 basis when necessary to accommodate essential
29 activities, respond to emergencies, or to otherwise
30 protect the public interest. Such modification shall
31 be issued in writing by the director or his designee

1 subject to such terms and conditions as he may
2 prescribe. The aquatic application of herbicides
3 which result in water use restrictions shall be
4 considered an activity for which a short-term
5 modification generally may be issued subject to the
6 following conditions:

7 (i) A request for a short-term modification
8 shall be made to the department on forms supplied by
9 the department. Such request generally shall be made
10 at least thirty days prior to herbicide application.

11 (ii) Such herbicide application shall be in
12 accordance with state of Washington department of
13 agriculture regulations.

14 (iii) Such herbicide application shall be in
15 accordance with label provisions promulgated by USEPA
16 under the Federal Insecticide, Fungicide, and
17 Rodenticide Act, as amended. (7 U.S.C. 136, et seq.)

18 (iv) Notice, including identification of the
19 herbicide, applicator, location where the herbicide
20 will be applied, proposed timing and method of
21 application, and water use restrictions shall be
22 given according to the following requirements:

23 (A) Appropriate public notice as determined and
24 prescribed by the director or his designee shall be
25 given of any water use restrictions specified in
26 USEPA label provisions.

27 (B) The appropriate regional offices of the
department of fisheries and game shall be notified
twenty-four hours prior to herbicide application.

(C) In the event of any fish kills, the
department of ecology, fisheries, and game shall be
notified immediately.

(v) The herbicide application shall be made at
times so as to:

(A) Minimize public water use restrictions
during weekends.

(B) Completely avoid public water use
restrictions during the opening week of fishing
season, Memorial Day weekend, July 4 weekend, and
Labor Day weekend.

(vi) Any additional conditions as may be
prescribed by the director or his designee.
(Emphasis added.)

23 The record indicates that the Department followed this procedure
24 and incorporated these conditions when it issued Order DE 85-257.

IV

Appellants contend that WAC 173-201-035(8)(e) is contrary to statutory authority. It is unclear whether this is intended as a facial attack on the regulation or an attack on its validity as applied in this case. If the former, the Board lacks authority to entertain the issue. Seattle v. DOE, 37 Wn. App. 819, 683 P.2d 244 (1984). If the latter, we conclude that the regulation is reasonably consistent with the statute it purports to implement. Weyerhaeuser Co. v. DOE, 86 Wn.2d 310, 545 P.2d 5 (1976). This conclusion flows from our interpretation of RCW 90.54.020(3)(b) set forth above. Moreover, the power to authorize short-term modifications of water quality standards is implicit in the authority to set the standards themselves. See RCW 90.48.035.

V

The standards applicable to the approval of an aquatic application of herbicides are, thus, whether the activity is "necessary to accommodate essential activities, respond to emergencies, or to otherwise protect the public interest."

We do not characterize the case at bar as involving either essential activities or an emergency. However, we conclude that it can be authorized under the "otherwise protect the public interest" rubric.

The water lilies are a serious impediment to the enjoyment of life and property around the lake. No one argues to the contrary. All parties are united in wanting to get rid of them.

1 We think it is in the public interest to clear the lake of lilies
2 and that, on the entire record, the use of the aquatic herbicide Rodeo
3 is the most appropriate means to this end. The alternatives
4 discussed during the hearing do not constitute reasonable alternatives.

5 VI

6 No necessity for an environmental impact statement under the State
7 Environmental Policy Act, chapter 43.21C RCW, was established (refer
8 to Finding of Fact XVI). ASARCO v. Air Quality Coalition, 92 Wn.2d
9 685, 601 P.2d (501 (1979)). DOE's reconsideration of its Order in
10 light of the King County DNS was not procedurally improper.

11 VII

12 This is a de novo hearing fulfilling the procedural function of
13 providing notice and an opportunity to be heard before the DOE
14 decision becomes final. Because the hearing is of this kind, it is
15 irrelevant that DOE may not have had all the information in fact
16 supporting the decision before it at the time it issued the Order.

17 VIII

18 To the extent that appellant is raising a constitutional due
19 process issue, this Board is without power to entertain it. Yakima
20 County Clean Air Authority v. Glascam Builders, 85 Wn.2d 255, 534 P.2d
21 33 (1975).

22 IX

23 The contention that because DOE allowed no "pre-order" public
24 input, the agency should have the burden of proof before the Board is
25 without merit. DOE is not required by law to involve the public

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1 before making decisions such as the instant one. The provisions of
2 RCW 90.54.060 calling for public involvement are, as applied to the
3 instant action, hortatory rather than mandatory.

4 We do, however, think it regrettable that DOE failed to respond to
5 citizen efforts to become involved. The agency's unresponsiveness,
6 while not fatal to the issuance of this Order, is not good public
7 policy. To some degree such unresponsiveness is the reason for this
8 appeal.

9 X

10 Any Finding of Fact which is deemed a Conclusion of Law is hereby
11 adopted as such.

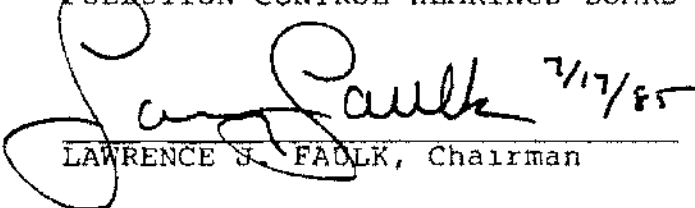
12 From these Conclusions of Law the Board enters this
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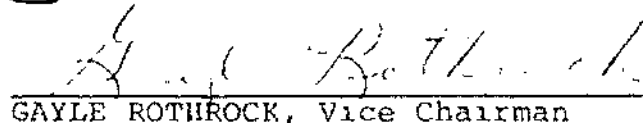
ORDER

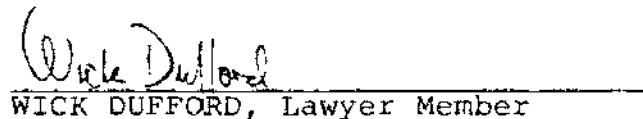
The Department of Ecology Order, No. DE 85-257, is affirmed.

DATED this 17th day of July, 1985.

POLLUTION CONTROL HEARINGS BOARD

 7/17/85
LAWRENCE S. FAULK, Chairman


GAYLE ROTHROCK, Vice Chairman


WICK DUFFORD, Lawyer Member